Enactments or resolutions of the legislative body clearly estop the government. Where the legislature, by public resolve, declared a certain monument to be the one referred to in an ancient Indian deed, the state was estopped from showing afterwards that it was not the monument referred to.[8] The acts of its agents, when fraudulent or unauthorized, do not estop the government, even when the agents act within the apparent scope of their authority; but this rule may be rested on the presumption of law that those who deal with public officers know the extent of their authority.[9] On the other hand, acts of agents as well as of the legislature, ought to estop the government, if the agents are authorized to shape its conduct in a particular transaction and have acted within the purview of their authority. Where, for instance, under a mistake of fact a public officer overpaid a corporation for its services in carrying the mail, the government was estopped to recover this money from a second corporation which had become the owner of the first, relying on the settlements made with the first by the agent of the government.[10] Even those courts, however, which accept the general principle that the state may be estopped *in pais* by acts of its agents seem still to be feeling their way, and apply the principle with extreme caution. A recent federal decision furnishes a good illustration of this attitude. *Walker* v. *United States*, 139 Fed. Rep. 409 (Circ. Ct., M. D. Ala.). The facts of the case were strong, and the estoppel was allowed, but the court circumspectly declined to commit itself to a more concrete declaration than that the rule would be applied "in a proper case." What is a proper case no court seems yet to have attempted to define.

LEGISLATIVE AUTHORIZATION OF NUISANCES. — Varying expressions of opinion are found in the books as to how far a legislature can authorize what would otherwise be a private nuisance, without providing for the constitutional compensation for the "taking" of private property. The cases seem to confine this form of protection rather strictly to instances of an actual seizure of physical property.[1] When, for example, a chartered railroad encroaches upon none of his land, a person whose real estate deteriorates in value by reason of the smoke, noise, and other concomitants of the proper operation of the road has no redress.[2] But if part of the plaintiff's land is occupied, compensation is often made not only for that portion and for the diminution in value of the remainder caused by the alteration in shape and size, but for the further depreciation resulting from the inevitable smoke, noise, cinders, and jarring created in the operation of the railroad on the portion condemned.[3] Thus, under the guise of compelling payment for land taken, are exacted damages for what is practically a nuisance to be maintained on that land. This eminently equitable result could, however, be reached without artifice simply by placing a less strict construction

[8] Commonwealth *v.* Pejepscut, 10 Mass. 155.

[9] Dement *v.* Rokker, 126 Ill. 174, 199; Filor *v.* United States, 9 Wall. (U. S.) 45.

[10] Duval *v.* United States, 25 Ct. of Cl. 46. See also Hartson *v.* United States, 21 Ct. of Cl. 451; People *v.* Stephens, 71 N. Y. 527, 561.

[1] See Garrett *v.* Lake Roland El. Ry. Co., 79 Md. 277.

[2] Beseman *v.* Pennsylvania R. R. Co., 50 N. J. Law 235; Carroll *v.* Wisconsin Cent. Co., 40 Minn. 168.

[3] Bangor, etc., R. R. Co. *v.* McComb, 60 Me. 290. See Walker *v.* Old Colony, etc., Ry. Co., 103 Mass. 10.

upon the constitutional phrase "taking of property." Property, in the constitutional sense, say many respectable authorities, consists not in the plot of land, but in the right to use it undisturbed.[4] Hence several decisions have called that a taking which without an entry by the trespasser virtually made the enjoyment by the ostensible owner impossible, as by a flood of water or of sand.[5] Others more broadly hold that an easement is property, the taking of which must be paid for.[6] The idea of property on which these cases proceed would lead to the conclusion that any material abridgment of rightful user is the taking of property.[7] On this theory, therefore, recovery might be had for all nuisances, however the legislature had attempted to sanction them, so far as they interfered with the comfortable enjoyment of an individual's land or chattel. This would make possible the collection of damages from a railroad company by very many whose land is situated near its line. Such incidental injuries, however, are said by the courts to be of that class which must be suffered for the common welfare, and which are too slight substantially to impair the rights of property recognized and protected by the state. That this position is logically inconsistent with any but a strict interpretation of constitutional phraseology has already been indicated, and that it is not even unequivocally desirable on grounds of public welfare is shown by the more modern constitutions and statutes, which provide for compensation when property is taken *or damaged.* Even these, however, under the narrow definition of property, leave many injured parties without a remedy.[8]

But whether or not the constitution is construed to assure compensation for an authorized nuisance the extent of the authorization is closely scrutinized. It may be because of such want of authorization that in a recent Texas case a householder was allowed to recover for mere personal inconvenience and annoyance arising from the operation of a freight depot near her premises. *St. Louis, etc., Ry. Co.* v. *Shaw*, 88 S. W. Rep. 817 (Tex., Civ. App.). A line of track authorized by legislative enactment necessarily entails certain inconveniences to a large share of the public, but freight yards, water-tanks, and round-houses are structures which may and therefore are intended to be located where they will be of the least possible harm to the community. For any nuisance due to their improper location the railroad is unquestionably liable.[9]

CONSTRUCTIVE TRUSTS ARISING ON BEQUESTS ON SECRET UNDERSTANDINGS. — It has recently been held in New York, that where a will recited that a bequest was to be used as the testator had ordered in his lifetime,

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[4] Lewis, Eminent Domain, §§ 54, 55. See Eaton *v.* Boston, etc., R. R., 51 N. H. 504, 511; Shaw, C. J. in Old Colony, etc., Ry. Co. *v.* County of Plymouth, 14 Gray (Mass.) 155, 161.

[5] Pumpelly *v.* Green Bay Co., 13 Wall. (U. S.) 166; Eaton *v.* Boston, etc., R. R., *supra.*

[6] See Lamm *v.* Chicago, etc., Rd. Co., 45 Minn. 71.

[7] Lewis, Eminent Domain, § 56; Cooley, Const. Lim., 7th ed., 787, 788; City of St. Louis *v.* Hill, 116 Mo. 527; Forster *v.* Scott, 136 N. Y. 577; City of Janesville *v.* Carpenter, 77 Wis. 288, 301; Pennsylvania R. R. Co. *v.* Angel, 41 N. J. Eq. 316, 329.

[8] See Aldrich *v.* Metropolitan, etc., El. Ry. Co., 195 Ill. 456.

[9] Baltimore, etc., R. R. Co. *v.* Fifth Baptist Church, 108 U. S. 317; Pennsylvania R. R. Co. *v.* Angel, *supra;* Missouri, etc., Ry. Co. of Texas *v.* Anderson, 81 S. W. 731 (Tex., Civ. App.).